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IN THE

Supreme Court of the United States

October Term, 1941

No. 201

AMERICAN MEDICAL ASSOCIATION, a Corporation, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

No. 202

THE MEDICAL SOCIETY OF THE DISTRICT OF COLUMBIA, a Corporation, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND SUPPORTING BRIEF.

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PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

American Medical Association,[1] a corporation, and The Medical Society of the District of Columbia,[2] a corporation, petitioners, respectfully pray for writs of certiorari to re-

[1] Hereinafter referred to as AMA.
[2] Hereinafter referred to as DMS.

view the decision and judgments of the United States Court of Appeals for the District of Columbia, entered June 15, 1942 (R. 1886, 1908, 1909), affirming the judgments of the District Court of the United States for the District of Columbia, entered May 29, 1941, on the verdict of a jury finding petitioners guilty on an indictment charging a conspiracy for the purpose of restraining trade in the District of Columbia in violation of Section 3 of the Sherman Act.[3]

SUMMARY STATEMENT.

The record in this case presents the basis for at least half a dozen ordinary cases, each presenting novel propositions of the utmost importance. We have made every effort to limit the length of this petition and brief consistent with giving the Court an understanding of the numerous issues involved and the law applicable thereto.

The indictment charges (R. 14, 15) petitioners with engaging in a conspiracy to restrain Group Health Association, Inc.,[4] a corporation, in furnishing through monthly salaried full-time employee-doctors, medical care to its members and their dependents; to restrain members of GHA in obtaining such medical care; to restrain GHA doctors; to restrain other doctors in the pursuit of their callings; and to restrain the Washington hospitals.

Petitioners contend that the indictment did not charge nor the proof show an offense under the Sherman Act for three basic reasons, any one of which is fatal to this prosecution.

First: because the activities alleged to have been restrained were not commercial, and hence not trade just as this Court held in *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 436, *Federal Club* v. *National League*,

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[3] Appendix, p. 55 *infra*.

[4] Hereinafter referred to as GHA.

259 U. S. 200, 209, and *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 493 (footnote 15), and the cases following it.

Second: because the indictment does not charge (despite the inference to the contrary in the decision below), nor the proof show that the alleged restraints affected the market, either by fixing prices or suppressing competition to the extent that prices were substantially affected, to the injury of the public. Such allegations and proof were necessary under the *Apex* case and the cases following it.

Third: because the alleged restraint arose out of a controversy concerning terms and conditions of employment of doctors, which, if doctors are tradesmen, was within the excluding purview of the Clayton[5] and Norris-LaGuardia[6] Acts as construed in *United States* v. *Hutcheson*, 312 U. S. 219, and the cases following it.

Petitioners also contend that GHA was practicing medicine illegally and otherwise violating Federal statutes, hence the alleged restraints against such activities would not violate the Act; that there was no evidence to support the charge; that when the verdict of the jury found all of the individual defendants not guilty, who could have been agents of or co-conspirators with corporate petitioners, there was no evidence left to support the verdict; that the court admitted improper evidence against both petitioners, including so-called "background evidence" of the actions of AMA only, at various places outside the District of Columbia long prior to the beginning of the alleged conspiracy to show that the purpose and intent of petitioners was as charged, and rejected the same kind of evidence offered by petitioners as to activities of GHA within the District during the period of the alleged conspiracy to show that the

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[5] Appendix, pp. 55, 56 *infra*.

[6] Appendix, pp. 56-59 *infra*.

purpose and intent of petitioners was not as charged. The court also incorrectly instructed the jury.

The Court of Appeals in its second opinion affirmed its first opinion and held that the word "trade" as used in the Sherman Act included the practice of medicine, its availability and financing, on the erroneous premise that the practice of medicine was recognized by the English cases as a trade, and therefore it was immaterial under the Sherman Act whether the practice of medicine and the rendering of medical services was or was not a commercial activity.

The Court of Appeals ignored the fact that the indictment did not allege nor the evidence prove that the activities of petitioners were exercised or used in such a way as to affect the market either by fixing prices or suppressing competition to the extent that prices were substantially affected, to the injury of the public, and held, regardless of the limitations of the indictment, that if a conspira[illegible] was shown, the purpose of which was to restrain competition by injuring GHA, it was sufficient to support the conviction. The error of this holding is two-fold. First, there was no such charge in the indictment but on the contrary the indictment proceeded upon the theory that the Sherman Act was a broad, remedial statute protecting every person individually in his occupation from any restraint. Second, even if such a charge were contained in the indictment, under the *Apex* case and the concurring opinion of Stone, C. J., in the *Hutcheson* case (pp. 241, 242), it would not charge a violation of the Act.

The court below held that physicians are in trade but that their associations, even though involved in a dispute over employment, are not within the protection of the Clayton and Norris-LaGuardia Acts because, the court asserted, physicians are not laborers who work for wages. The Court seems to have overlooked the fact that the cases which it

cited to support this premise, hold that professional activities are not commercial and not in trade.

The court below in its first opinion, based on the allegations of the indictment, held that GHA was not practicing medicine illegally or otherwise violating Federal statutes and in its second opinion held those facts were immaterial and inadmissible in evidence.

The court below held that there was evidence to support the charge and that the verdict finding the corporate petitioners guilty is sufficiently supported even though all the individual defendants were found "not guilty" and there was no evidence tending to show that any person other than the individual defendants was an agent of corporate petitioners or a co-conspirator, and held that a corporation can have a specific criminal intent without the intervention of any human person (R. 1907).

The court below held that the so-called "background" evidence offered by the Government pertaining to the activities of AMA outside the District long before the beginning of the alleged conspiracy was admissible against both petitioners on the theory that it was evidence of intent or purpose of petitioners, but rejected similar evidence offered by petitioners pertaining to the activities of GHA within the District and during the period of the alleged conspiracy to show that the intent or purpose of petitioners was not to restrain GHA but to defend their medical societies and their lawful principles of ethics, rules and regulations. The court held that even if petitioners' intent and purpose was a reasonable regulation of their members in the practice of medicine, that fact was no defense, if their actions adversely affected GHA.

The Court of Appeals without discussion as to what evidence tended to support the verdict, or what petitioners did that constituted conspiracy to violate the Sherman Act, repeatedly stated that petitioners' acts were criminal and

held that the evidence was adequate to support the verdict, and, without stating the substance of any of the instructions complained of, held that the jury was properly instructed.

This case presents a controversy relating to and growing out of the terms and conditions of employment of doctors in the medical profession.[7] AMA, the national organization, DMS, the local organization, and the doctors who are members of these organizations have long observed and followed a code of professional ethics and this code has been supplemented by association rules and regulations initiated by and agreed to by the members themselves and made, by them, a necessary condition of membership in their medical organizations.

GHA, incorporated under a non-commercial District statute,[8] sought to engage in the practice of medicine by the device of opening a clinic, including offices for a staff of doctors, whom it employed by the month, on a full-time salary basis. This arrangement, it was generally believed by petitioners, as well as by the law enforcement authorities of the District, was illegal.

Although many doctors who were not members of petitioners were available to GHA, that corporation, despite

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[7] Previous to this prosecution the courts of this country had held, without dissent, that the enforcement of rules and regulations of medical societies or hospitals does not create causes of action, legal or equitable. *Bryant* v. *District of Columbia Dental Society*, 26 App. D. C. 461; *Newton* v. *Board of Commissioners*, 86 Colo. 446, 282 P. 1068; *Olander* v. *Johnson*, 258 Ill. App. 89; *Irwin* v. *Lorio*, 169 La. 1090, 126 S. 669; *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432; *Weyrens* v. *Scotts Bluff County Medical Society*, 133 Neb. 814, 277 N. W. 378; *Branagan* v. *Buckman*, 67 Misc. 242, 122 N. Y. S. 610, affirmed 130 N. Y. S. 1106; *Strauss* v. *Marlboro County General Hospital*, 185 S. C. 425, 194 S. E. 65; *Harris* v. *Thomas* (Tex. Civ. App.), 217 S. W. 1068; *Porter* v. *King County Medical Society*, 186 Wash. 410, 58 P. (2d) 367.

[8] Act of March 3, 1901, c. 854 (31 Stat. 1283) D. C. Code, 1940, Title 29, Sections 29-601 to 29-605, for the incorporation of charitable, educational and religious associations.

full knowledge of the principles of ethics and the rules and regulations governing the professional activities of petitioners' members, willfully sought to induce certain doctors who were members of petitioners, to ignore and violate their medical society obligations and accept employment on the GHA hired staff.

Apprehensive of impending controversy, members of DMS immediately sought both by individual and group conferences, to persuade GHA, in its employment of doctors who were medical society members, to make some effort to conform to the principles of ethics, and the employment rules and regulations of DMS. These overtures were flatly rejected by GHA and it persisted in endeavoring to proselyte petitioners' members, to induce them to ignore medical association rules, and to create controversies between such members and petitioners. The controversy here involved followed. To acquaint its members with the facts, the AMA published in its Journal an article that was critical of GHA. Two of the doctors employed by GHA were members of DMS. DMS had a provision in its constitution that any of its members accepting contracts of employment must submit such contracts for approval to a committee of DMS. The two doctors, under the urging of GHA, refused to do so, and after a full hearing, one of them was expelled from DMS.

The Government contended that petitioners intended to restrain GHA and its employee-doctors and members; whereas petitioners asserted they intended only to preserve, protect, and to defend their medical societies, their principles of ethics, rules and regulations, from impairment and destruction.

The petitioners were also charged with restraining the Washington hospitals. In 1934, AMA adopted the Mundt

Resolution [9] which was thereafter transmitted to intern and resident hospitals. Several of the local hospitals already had such a rule. No hospital was ever required as a condition of approval, to confine its staffs to society members. An inspection of local hospitals, had in the summer of 1937, far from being a part of an aim to restrain GHA, was, under the uncontradicted evidence, solicited by the hospitals and carried out on behalf of AMA by persons who had no knowledge of the existence of GHA.

Obviously, membership in the medical societies aided and advanced the general professional welfare of members, and, as conceded in the indictment, became of importance and value to conforming members. GHA, while insisting upon the right of its employed doctors to retain society membership, nevertheless proposed that observance of society codes, rules and regulations could be ignored, at the will of a particular member, without loss of society membership and that any attempt on the part of the society to require conformance with such rules operated as an illegal restraint of the member as well as of his employer, GHA.

Obviously, such a controversy threatened the continued welfare and existence of petitioners and made everything relating to GHA's terms and conditions of employing petitioners' members, of interest to petitioners, particularly in so far as petitioners' codes, rules and regulations might be violated. If GHA was operating in violation of Federal statutes and its activities presented an illegal, unethical, or unprofessional operation, if it was engaged in questionable practices which appeared to be inimicable to the best interests of either the public, the medical profession, or the petitioners or their members, then petitioners owed its mem-

[9] Resolved that it is the opinion of the House of Delegates of the American Medical Association that physicians on the staffs of hospitals approved for intern training by the Council on Medical Education and Hospitals be limited to members in good standing of their local county medical societies and that the House of Delegates requests the Council on Medical Education and Hospitals to take this under advisement.

bers, to say nothing of the public, the duty of opposing, avoiding and preventing the injury to petitioners, and their members, through the proselyting tactics of GHA. The court below said physicians may organize, establish standards of professional conduct and effect agreements for self-discipline and control, but in the same breath said that if such standards and agreements are enforced and some other professional or business group are injured the Sherman Act is violated.

As the hospitals might well be considered the workshop of physicians, legitimate persuasion and reasoned argument might lawfully be directed toward the hospitals, recommending preference to organization members whose codes, rules and regulations were known and established, as against others not so well recommended. That could not possibly amount to criminal restraint of GHA under the Sherman Act. The court below said petitioners might use legitimate persuasion and reasoned argument as a means of winning public sentiment to their point of view but in the same breath said that when they so persuade and argue with the hospitals or when petitioners' members persuade and argue among themselves, they violate the Sherman Act.

Out of this controversy came the indictment wherein 21 doctors [10] and four medical associations [11] were indicted.

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[10] Dr. Olin West was Secretary and General Manager of AMA. Dr. Morris Fishbein was Editor of the Journal of the AMA. Dr. William Creighton Woodward was Director of the Bureau of Legal Medicine and Legislation of the AMA. Dr. William Dick Cutter was Secretary of the Council on Medical Education and Hospitals of the AMA. Dr. Roscoe Genung Leland was Director of the Bureau of Economics of AMA. Dr. Thomas Edwin Neill was President of the DMS. Dr. Coursen Baxter Conklin was Secretary-Treasurer of the DMS. All the other individual defendants were physicians and members of the DMS or members of some committee thereof, or were on the regular staff of some of the Washington hospitals during all or part of the period of the alleged conspiracy.

[11] American Medical Association, Medical Society of the District of Columbia, Washington Academy of Surgery, and Harris County (Texas) Medical Society.

A demurrer to the indictment, particularly upon the ground of inapplicability of the Sherman Act, was sustained by the District Court (28 F. Supp. 752). The Court of Appeals reversed, holding that the Act was a broad remedial statute, intended to protect all individuals in all occupations, professional or commercial, and any restraint upon an individual is prohibited by the Act. The opinion did not even contend the indictment charged that competition was suppressed to the extent that market prices were affected. The case thereafter was tried upon the law laid down by the Court of Appeals. Upon the trial, two individual defendants and two defendant associations were discharged by directed verdict. Motions to direct verdicts for each defendant, at the close of all the evidence, were denied. Of the remaining defendants, all the individual defendants were acquitted, and only the corporate petitioners were convicted. After verdict petitioners moved the court to disregard all the evidence pertaining to the acts and doings of the individual defendants found "not guilty" and to enter a judgment for the corporate petitioners notwithstanding the verdict, and also moved the court in arrest of judgment and for a new trial. These motions were denied.

Furthermore, the indictment itself, a calculated, colored, argumentative appeal to passion and prejudice, and so characterized by the District Court upon demurrer (28 F. Supp. 752), was permitted to go to the jury in spite of timely objections by petitioners.

The court admitted in evidence, over objections, so-called "background" evidence offered by the prosecution against both petitioners which concerned many acts of AMA, long antedating the conspiracy here alleged, neither involving nor relating to nor within the knowledge of DMS. Nor did such acts occur in the District nor were they involved in the conspiracy here pleaded. Nor did they have reference to other plans and types of medical service shown to be the same as or analogous to that followed by GHA. Nor

were the objections urged against GHA, shown to be present elsewhere. This evidence was offered upon the theory that since the Government alleged that AMA had opposed all medical service plans, *ipso facto*, it was probable that it had opposed GHA in the present controversy. Obviously, such proof was exceedingly prejudicial to both petitioners and particularly to the local society, but it was admitted upon the authority of the Court of Appeals' first opinion which, in turn, was based upon *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238, which clearly, upon examination seems wholly irrelevant.[12] The conviction of petitioners might well have resulted from the admission of this irrelevant evidence alone.

Notwithstanding the fact that the court admitted the aforesaid "background" evidence against both petitioners to show purpose and intent, it rejected similar evidence offered by petitioners to show the activities of GHA within the District during the indictment period for the purpose of showing that the acts of petitioners were not for the purpose or intent of restraining GHA but to protect their medical societies, their principles of medical ethics, rules and regulations, and to reasonably regulate their own members. The indictment, in innumerable instances, charged that the acts done by the petitioners were done "for the purpose of" restraining GHA, etc., and the Government continually so asserted throughout the trial and the argument. Upon the trial the petitioners claimed, and offered to prove, that the acts of the petitioners were wholly defensive, and were based upon the known, or believed, unfit, unethical and illegal nature and conduct of GHA. The petitioners offered to prove such acts and conduct and what the public authorities specifically publicly charged concerning GHA's illegal activities, for the purpose of

[12] The court below, in its second opinion, again cited (R. 1904) the *Chicago Board of Trade* case and other cases on this point, but none of them hold that "background" evidence such as here involved is admissible.

showing that petitioners were protecting themselves and their members against attacks being made on them by GHA, and that the purpose of all of the acts of the petitioners was to preserve, protect and defend petitioners and their codes and rules, relating to, and adopted in the interest of the profession, the public and their own members. This proof, vital though it was to the establishment of the defense, and in direct refutation of the charge of purpose in the indictment, and despite the decision of this Court in the *Chicago Board of Trade* case, was rejected by the court as irrelevant and immaterial. This on the theory that if GHA was injured as a result of the acts of the petitioners, then the intent and purpose behind the acts was immaterial, despite the charge of purpose in the indictment. The crippling effect of such ruling is at once apparent. It practically foreclosed the defense of petitioners. The court ruled and charged, over petitioners' objections, in full accord with the theory of the Government, as detailed above, and such rulings were assigned as error.

Petitioners, being corporations, could be criminally liable on a charge of conspiracy only through imputation to the corporation of the wrongful acts of agents. All of the agents of petitioner corporations, who were in any way involved in the controversy, were found "not guilty." The indictment did refer to "others unknown" but that is immaterial, since the record contains no evidence sufficient to support any conviction purporting to come from or relating to any "unknown" person. Such evidence as there was, was confined to the individual defendants indicted and acquitted.[13] The question here is not one of incon-

[13] In this respect this case differs from *United States* v. *General Motors Corporation*, 121 F. 2d 376, 411.

sistency between verdicts [14] but of an utter failure of proof to support the verdict against petitioners.[15]

After verdict, petitioner moved the court to disregard all the evidence pertaining to the acts and doings of the individual defendants found "not guilty" and to enter judgment for petitioners notwithstanding the verdict. This upon the ground, among others, that, since the evidence related, as original evidence, to the acts of the individual defendants, and since all of this evidence was received on the theory that such individual defendants were co-conspirators, the acquittal of the individual defendants necessarily destroyed the co-conspirator basis. Therefore, as the individual defendants were acquitted, no criminal act, intent, or element remains from which guilt could be imputed to petitioners.

The situation is analogous to that of two conspirators, where one is acquitted,[16] and to cases arising under the rule of respondent superior, where the agent or servant doing the act, is acquitted.[17] Under such circumstances, evidence relating to the acquitted party cannot remain to build up a case against the party held. In these respects the law is clear and there is no conflict.

Moreover, much of the evidence relating to the acts and doings of the individual defendants was highly prejudicial in its nature, and the petitioners contended that the very presence of such evidence in the record, in view of the ultimate acquittal of the individual defendants, inevitably and unavoidably tainted the verdict against petitioners, and thus prevented them from having a

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[14] We have here no multiple counts, as were controlling in *Dunn* v. *United States*, 284 U. S. 390, but a single count, wholly depending for its substance on the guilt of the individual defendants, found "not guilty."

[15] See supporting brief, pp. 40-43 *infra*.

[16] See supporting brief, pp. 41, 42 *infra*.

[17] See supporting brief, pp. 41, 42 *infra*.

separate and unbiased consideration of the case against them, and denied them a fair trial.[18]

But whether the so-called co-conspirator testimony or the respondeat superior rule is considered or not, petitioners assert that there has been a complete failure of proof to establish the charge. This is so because the charge and the acts involved are outside the purview of the Sherman Act. Moreover, petitioners, if doctors be tradesmen, are entitled under the circumstances of this case to the protection of the Clayton and Norris-LaGuardia Acts. The second opinion of the Court of Appeals concedes that petitioners would be within the Clayton and Norris-LaGuardia Acts if those Acts cover "tradesmen" such as doctors, but construes those Acts to cover only laborers who work for wages. Furthermore, GHA was engaged in illegal activities and was violating Federal statutes, and restraints against such illegal activities, even if established, are not and cannot be restraints forbidden and punishable under the Sherman Act. Since physicians have the right to form associations, to establish standards of professional conduct and to effect agreements for self discipline and control, the discussions by petitioners' members pro and con at meetings do not support the charge of conspiracy here involved against petitioners. Otherwise, no society could ever meet without, *ipso facto*, conspiring. The official actions of DMS or AMA were within their lawful powers and related to matters properly within the interest of their organizations, and do not support the charge against them. The hospitals were individual corporations bound only by the action of their proper officials, and with a right to omit or exclude from the medical staffs of such hospitals, doctors whose qualifications, abilities or ethics were in dispute. The exercise of such

[18] See supporting brief, pp. 43, 44 *infra*.

right by the hospitals against GHA doctors, even if through persuasion by others, is insufficient to support the charge that the hospitals were "conspiring with petitioners." Moreover the Court of Appeals held that the defendants had the right of legitimate persuasion and reasoned argument, and no act shown in the record went beyond that. Indeed, when compared with analogous actions by labor, trade, and other associations in support of what they may have believed to have been for the best interest of such organizations, the acts charged or proven to petitioners are innocuous in the extreme.

There is not a scintilla of evidence tending to show that the market was affected either by fixing prices or suppressing competition to the extent that prices were substantially affected, to the injury of the public. No such proof was attempted because no such charge appears in the indictment.[19]

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[19] The charging part of the indictment alleged petitioners conspired for the purpose of restraining trade in the District of Columbia as follows (R. 14, 15):

(1) for the purpose of restraining Group Health Association, Inc., in its business of arranging for the provision of medical care and hospitalization to its members and their dependents on a risk sharing prepayment basis;

(2) for the purpose of restraining the members of Group Health Association, Inc., in obtaining, by cooperative efforts, adequate medical care for themselves and their dependents from doctors engaged in group medical practice on a risk sharing prepayment basis;

(3) for the purpose of restraining the doctors serving on the medical staff of said Group Health Association, Inc., in the pursuit of their callings;

(4) for the purpose of restraining doctors (not on the medical staff of Group Health Association, Inc.) practicing in the District of Columbia, including the doctors so practicing who are made defendants herein, in the pursuit of their callings;

(5) for the purpose of restraining the Washington hospitals in the business of operating such hospitals.

The results accomplished by the alleged conspiracy are stated in the indictment, as follows (R. 20):

"The • • • conspiracy • • • has, as intended by defendants, prevented doctors from becoming or remaining members of the medical staff of Group Health Association, Inc., and has prevented

Other serious errors were committed in the reception of evidence, such as that contained in and attached to the minutes of DMS, the hearsay evidence pertaining to the hospitals and other hearsay evidence, in the rejection of petitioners' written and oral offers of proof, in refusing instructions requested by petitioners, and in the charge of the court to the jury. These errors are identified in the supporting brief.

JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 240 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938), 28 U. S. C. 347.

QUESTIONS PRESENTED [20]

1. Whether the practice of medicine and the rendering of medical services as described in the indictment are "trade" under Section 3 of the Sherman Act.

2. Whether the indictment charged or the evidence proved "restraints of trade" under Sec. 3 of the Sherman Act.

3. Whether a dispute concerning terms and conditions of employment under the Clayton and Norris-LaGuardia Acts was involved, and, if so, whether petitioners were interested therein, and therefore immune from prosecution under the Sherman Act.

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other doctors from consulting with the doctors on the medical staff of Group Health Association, Inc., and has prevented doctors on the medical staff of Group Health Association, Inc., from treating and operating on their patients in any of the hospitals in or near the District of Columbia."

As there is no charge, there could be no proof that the market was affected either by fixing prices or suppressing competition to the extent that prices of any commodity or service were substantially affected, to the injury of the public, as required by the *Apex* case.

[20] The errors to be urged are in the supporting brief, pp. 28, 29, *infra*.

4. Whether (a) GHA was a corporation engaged in the corporate practice of medicine contrary to law; and (b) engaged in an insurance operation contrary to law, and if so (c) whether those facts were a complete defense as a matter of law or were relevant to any issue in the case and admissible in evidence for the consideration of the jury.

5(a). Whether, considering all the evidence in the record, petitioners' motions to direct a verdict or for judgment notwithstanding the verdict or for a new trial should have been granted.

5(b). As the jury by its verdict found all of the individual defendants not guilty and found two corporations guilty, whether the evidence pertaining to the acts and doings of the individual defendants found not guilty should have been disregarded, and petitioners' motion for judgment notwithstanding the verdict, or motion for a new trial should have been granted.

6. Whether petitioners' motion in arrest of judgment should have been granted.

7. Whether petitioners' motion at the beginning of the trial to expunge specified portions of the indictment because they contained prejudicial matter and improper argument should have been granted, and whether petitioners' objection at the conclusion of the trial to sending the indictment with the jury in its deliberations for the foregoing reasons should have been sustained.

8. Whether it was error to receive in evidence against both petitioners (a) occurrences involving AMA only, antedating the alleged conspiracy and outside of the District of Columbia, as "background"; (b) statements contained in and letters and documents attached to the Minutes of DMS and of the Executive Committee and other committees of DMS; (c) hearsay and otherwise incompetent evidence per-

taining to the Washington hospitals; (d) hearsay evidence in general.

9. Whether it was error to refuse evidence offered by petitioners tending to show that petitioners did not have a purpose or intent to restrain trade, but on the contrary, their purpose or intent was to advance the interests of their members, and to enforce their admittedly valid rules and regulations and principles of medical ethics; and that the restraints, if any, were indirect and reasonable.

10. Whether the court erred in refusing instructions requested by petitioners and in charging the jury.

REASONS FOR GRANTING THE WRIT.

Nearly all of the reasons usually advanced for the allowance of a writ of certiorari are present in this case.[21] The Court of Appeals has not given proper effect to applicable decisions of this Court; has decided questions of general importance, and questions of substance relating to the construction or application of the Constitution and statutes of the United States, which have not been but should be settled by this Court; has decided important questions of Federal

[21] The United States previously petitioned this Court for certiorari (No. 377, October Term, 1939) to remove this case from the Court of Appeals for a decision here on the action of the District Court in sustaining a demurrer to the indictment, for the reasons that the questions involved are "so important" that they should be decided by this Court, and that the "questions of substance relating to the construction and application of" the Sherman Act "have not been, but should be, settled by this Court," and irrespective of how the Court of Appeals decided the questions involved "in view of the nature of the issues, it is probable that this Court would then see fit to grant * * * certiorari."

After the Court of Appeals reversed the action of the District Court sustaining the demurrer, these petitioners petitioned this Court for certiorari (No. 959, October Term, 1939) and the United States in its brief in opposition agreed that the question of the application of the Sherman Act to the charge is "a novel one of importance sufficient for this Court to settle" but contended that certiorari should be denied because the decision was "interlocutory" and "not final".

law which have not, but should be, settled by this Court; has decided Federal questions in a way in conflict with applicable decisions of this Court and has decided important questions of general law in conflict with decisions of this Court, of other Circuit Courts of Appeal and of the majority of the highest courts of the states.

1. The Court of Appeals did not give proper effect to applicable decisions of this Court when it held that the practice of medicine and the rendering of medical services described in the indictment were "trade" within the meaning of the Sherman Act. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 436, held that the liberal arts and the learned professions were not in "trade" within the meaning of Section 3 of the Sherman Act. *Federal Club* v. *National League*, 259 U. S. 200, 209, held that baseball, and by way of example, the practice of law, is not "trade" under the Sherman Act. Other decisions of this Court have held that the learned professions are not "trade."[22] *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 493 (footnote 15), held that no activity could be "trade" within the meaning of the Sherman Act unless it was commercial. The *Apex* case pointed out the legislative history of the Sherman Act and decided that the Act did not cover all activities held to be trade at common law but only those that were "commercial."[23] In this respect the *Apex* case followed the reasoning of the aforesaid previous decisions of this Court.

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[22] *Dandridge* v. *Washington's Executors* (1829), 27 U. S. 369, 377.
May v. *Sloan* (1879), 101 U. S. 231, 237.
Graves v. *Minnesota* (1926), 272 U. S. 425, 429.
Federal Trade Commission v. *Raladam Co.* (1931), 283 U. S. 643, 653.
Semler v. *Dental Examiners* (1935), 294 U. S. 608, 610-612.
Decisions to the same effect in Federal Courts of Appeal and state courts appear in the supporting brief, p. 30, *infra*.

[23] The court below says the practice of medicine was recognized by the English cases as constituting trade (R. 1886). Those cases do not hold the practice of medicine to be trade, and that specific issue was not raised or decided in those cases. The English cases dealt with the validity of ancillary covenants incident to the sales of professional practices. While

2. The Court of Appeals did not give proper effect to applicable decisions of this Court when it held that if a conspiracy was shown, the purpose of which was to injure GHA, it was sufficient to sustain the conviction. The *Apex* case held that the Sherman Act did not take over the entire doctrine of restraint of trade at common law but only took over and included restraint which had been exercised or used in such a way as to affect the market, either by fixing prices or suppressing competition to the extent that prices were substantially affected, to the injury of the public. The indictment was drawn before the decision in the *Apex* case and the charge did not even purport to meet the requirements of the *Apex* case and there was not a scintilla of evidence offered or received pertaining to market prices.

The decision of the Court of Appeals also conflicts with decisions of other Circuit Courts of Appeal,[24] and decides questions of substance relating to the construction and application of the Commerce Clause of the Constitution of the United States and of the Sherman Act.

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a few of those cases, in determining the validity of covenants not to practice medicine in a given locality or during a given time, apply the rule announced in "restraint of trade" cases, "restraint of trade" was not the basis for decision and the overwhelming majority of those cases are based upon principles of public policy, the law of contracts or local statutes and do not even mention "restraint of trade." The *Apex* case considered the English cases and concluded that only "commercial" activities are within the meaning of the word "trade" as used in the Sherman Act.

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[24] *United States* v. *Gold*, 115 F. 2d 236-238; *Gundersheimer's Inc.* v. *Baker, etc., I. Union*, 73 App. D. C. 352, 353, 119 F. 2d 205, 206; *International Ladies' G. W. Union* v. *Donnelly G. Co.*, 119 F. 2d 892-898; *International Ass'n, etc.* v. *Pauly Jail Building Co.*, 118 F. 2d 615, 621; *United States* v. *Local 807 of I. Brotherhood, etc.*, 118 F. 2d 684, 686, 688, 689, affirmed March 2, 1942, — U. S. —, and in the affirmance opinion, footnote 1 shows that the United States abandoned the convictions obtained in the District Court under the Sherman Act and did not seek a review of the decision of the Court of Appeals setting aside the convictions because that court construed the *Apex* case to hold that the evidence must show price fixing or that the acts of the accused had in fact affected prices.

3. The Court of Appeals did not give proper effect to applicable decisions of this Court when it held that the Clayton and Norris-LaGuardia Acts cover only disputes between wage earners or laborers on the one hand and aggregated capital on the other, and when it held "that some phases of labor disputes may come under the condemnation of the Sherman Act, if, for example, they involve a combination or conspiracy which has as its purpose restraint upon competition." Such holdings conflict with *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, 559, 560; *United States* v. *Hutcheson*, 312 U. S. 219; and *Drivers Union* v. *Lake Valley Co.*, 311 U. S. 91.

The decision of the Court of Appeals also conflicts with another decision of the court below and two decisions in the Eighth Circuit,[25] and decided questions of substance relating to the construction and application of the Clayton and Norris-LaGuardia Acts which have not been, but should be, settled by this Court when it limited the protection of such Acts to laborers and wage earners. The plain language of Section 13 of the Norris-LaGuardia Act protects all persons and associations involved in a dispute over employment who are engaged in the same industry, *trade*, craft or *occupation*.

4. The Court of Appeals has decided questions of general importance and questions of substance relating to the construction and application of the Healing Arts Practice Act and the Health, Accident and Life Insurance Companies' Act of the District of Columbia, which have not been, but should be, settled by this Court, and has decided important questions of general law in conflict with decisions

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[25] *Gundersheimer's, Inc.* v. *Baker, etc. I. Union*, 73 App. D. C. 352, 353, 119 F. 2d 205, 206; *International Ladies G. W. Union* v. *Donnelly G. Co.*, 119 F. 2d 892, 898, and *International Ass'n, etc.* v. *Pauly Jail Bldg. Co.*, 118 F. 2d 615, 620.

of the majority of the highest courts of the states [26] when it held that a corporation formed under the Act for the incorporation of charitable, educational and religious associations, such as GHA, could lawfully establish and maintain a medical clinic, including doctors' offices, and employ therein full-time doctors on monthly salaries to render medical services to its members in return for dues paid by them. The Court of Appeals decided questions of substance relating to the construction and application of the Sherman Act when it held that even if GHA was violating Federal statutes and operating illegally, those facts were immaterial, not a defense and could not be shown in evidence nor argued to the jury.

5. The Court of Appeals did not give proper effect to applicable decisions of this Court when it held that the trial court did not err in overruling petitioners' motions to direct a verdict and in overruling petitioners' several motions after verdict. The *Apex* and *Hutcheson* cases were decided after the first opinion of the Court of Appeals, and when it appeared at the time of trial that, considering the law as laid down by those cases, the indictment did not charge an offense, petitioners' motion in arrest of judgment should have been granted. The proof, of course, went to the indictment as drawn, hence petitioners' motions to direct a verdict and to enter judgment notwithstanding the verdict should have been granted.

The Court of Appeals did not give proper effect to applicable decisions of this Court, decided important questions of general law in conflict with decisions of this Court, of other Circuit Courts of Appeal and of the majority of the highest courts of the states, when it held that the trial court did not err in overruling petitioners' motion for judgment notwithstanding the verdict. The situation presented by

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[26] See supporting brief, pp. 36-40, *infra*.

the verdict finding all of the individual defendants "not guilty" made applicable that long line of cases which, without dispute, hold that when a servant is discharged the master cannot be convicted if the conviction must rest on the activities of the servant,[27] and those cases which hold that if all co-conspirators except one are found "not guilty" there can be no conviction of a remaining co-conspirator,[28] and other cases which hold that corporations cannot be guilty of crimes or misdemeanors except through the action of individual agents or servants.[29] This is because the evidence against the agent or co-conspirator found "not guilty" must be disregarded and eliminated.[30]

After disregarding the evidence pertaining to the activities of the individual defendants found "not guilty", if it be thought that there was still evidence in the record to support the verdict, nevertheless it was clear that, with the great mass of evidence in the record pertaining to the activities of the individual defendants found "not guilty", petitioners did not have an adequate separate consideration of their defense,[31] and the petitioners' motion for a new trial should have been granted.

6. The Court of Appeals decided important questions of general law in conflict with other Circuit Courts of Appeal when it held that the trial court was correct in refusing the motion of petitioners at the beginning of the trial to expunge specified portions of the indictment and

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[27] See supporting brief, pp. 41, 42, *infra*.

[28] See supporting brief, p. 41 *infra*.

[29] See supporting brief, p. 42 *infra*.

[30] The cases of *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, 233, and *United States* v. *General Motors Corporation*, 121 F. 2d 376, 411, when carefully analyzed, are not to the contrary.

[31] *United States* v. *Standard Oil Co.*, 23 F. Supp. 937, 938, 939, which seems to have approval on this point in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 243; *Wilson* v. *United States*, 109 F. 2d 895, 896, and *Collenger* v. *United States*, 50 F. 2d 345, 350.

to exclude evidence pertaining thereto, because it contained prejudicial matter, argument and passionate appeals to the jury (R. 30, 33, 87), and in overruling the objection of the petitioners at the conclusion of the charge to the jury to sending the indictment with the jury for the same reasons (R. 1513). *Johnson* v. *United States*, 59 F. 2d 42, 44; *Beck* v. *United States*, 33 F. 2d 107, 110.

7. The Court of Appeals did not give proper effect to the applicable decisions of this Court and decided important questions of general law in conflict with other Circuit Courts of Appeal when it approved the action of the trial court in receiving in evidence so-called "background" evidence of occurrences, events and correspondence all over the United States on dates long antedating the beginning of alleged conspiracy and in refusing the motion of petitioners at the close of all the evidence to strike such evidence and in receiving in evidence so-called "hospital" evidence when there was no prima facie showing that the hospitals were co-conspirators, and in refusing the motion of the petitioners at the close of all the evidence to strike such "hospital" evidence. The decision as to the "background" evidence is in conflict with *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357; *Wilson* v. *United States*, 109 F. 2d 895, 896, and *Eastern States Petroleum Co.* v. *Asiatic P. Corp.*, 103 F. 2d 315, 319, and as to the hearsay hospital evidence is in conflict with *Tri-State Broadcasting Co.* v. *Federal C. Commission*, 68 App. D. C. 292, 294, 295; 96 F. 2d 564-567; *Stager* v. *United States*, 233 F. 510, 513, and *Pope* v. *United States*, 289 F. 312, 315.

8. If the so-called "background evidence" was admissible against petitioners on the theory that it tended to show intent and purpose, then the Court of Appeals did not give proper effect to the applicable decisions of this

Court when it held the evidence offered by petitioners, tending to show that GHA was violating Federal statutes and otherwise operating illegally and improperly, was not admissible as tending to show that the intent and purpose of petitioners was not to restrain GHA but to uphold their established standards of professional conduct for their members and their agreements for self-discipline and control.[32] *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238. The proffered evidence was not a reason or excuse for what was done but was evidence tending to show intent and purpose. If any of the proffered proof formed a link in the evidence on any issue in the case, its refusal is a sufficient basis for the allowance of certiorari. *McCandless* v. *United States*, 298 U. S. 342, 346.

9. The Court of Appeals did not give proper effect to the applicable decisions of this Court and decided important questions of general law in conflict with other Circuit Courts of Appeal and decided questions of substance relating to the construction and application of the Commerce Clause of the Constitution of the United States, the Sherman Act, the Clayton and Norris-LaGuardia Acts, the Healing Arts Practice Act, and the Health, Accident and Life Insurance Companies' Act of the District of Columbia, when it upheld the action of the District Court in refusing instructions requested by petitioners and in the giving of instructions to the jury.[33]

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[32] The offers of proof appear at R. 910-920, 961, 1011, 1013-1025, 1355, 1356, 1363, 1420, 1429-1435, 1438 and 1440. The ultimate facts which the offers of proof tended to show appear in the supporting brief, pp. 49, 50 *infra*.

[33] *Apex* and *Hutcheson* cases and see supporting brief, pp. 51-54 *infra*.

CONCLUSION.

WHEREFORE, the petitioners pray the granting of writs of certiorari to the United States Court of Appeals for the District of Columbia.

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CHARLES S. BAKER,
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Attorneys for Petitioners.

July 3, 1942.

IN THE

Supreme Court of the United States

October Term, 1941

No. .....

AMERICAN MEDICAL ASSOCIATION, a Corporation, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

No. .....

THE MEDICAL SOCIETY OF THE DISTRICT OF COLUMBIA, a Corporation, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

THE OPINIONS BELOW.

Petitioners' demurrer to the indictment was sustained in *United States* v. *American Medical Association, et al.*, 28 F. Supp. 752. This decision was reversed by the Court of Appeals in its first opinion, *United States* v. *American Medical Association, et al.*, 72 App. D. C. 12, 110 F. 2d

703. The second opinion of the Court of Appeals, filed June 15, 1942, affirming the judgments of conviction against petitioners, is not yet reported and is at R. 1886.

A statement of the case appears in the petition.

SPECIFICATION OF ERRORS TO BE URGED.

The court below erred: (1) In reversing the judgment of the District Court sustaining petitioners' demurrer to the indictment. (2) In holding the indictment charged a conspiracy in violation of Sec. 3 of the Sherman Act. (3) In holding the indictment was not insufficient and not prejudicial. (4) In affirming (on the second appeal) petitioners' convictions. (5) In construing Sec. 3 of the Sherman Act as applying to and forbidding the activities charged in the indictment or proven in the evidence. (6) In construing the Clayton and Norris-LaGuardia Acts as not applying to the activities charged in the indictment or proven in the evidence. (7) In construing the Healing Arts Practice Act and the Insurance Code of the District as permitting GHA, a corporation, to practice medicine without a license, and to engage in an insurance operation, without complying with the Insurance Code. (8) In holding that a restraint on an activity which was violative of Federal statutes and otherwise illegal and criminal is, nevertheless, a violation of the Sherman Act. (9) In affirming the following: (a) the denial of petitioners' motion to strike portions of the indictment and to exclude evidence pertaining thereto; (b) the overruling of petitioners' objections to sending the indictment with the jury; (c) the admission of evidence offered by respondent; (d) denial of petitioners' motion to strike evidence erroneously received; (e) the denial of petitioners' written and oral offers of proof; (f) the denial of petitioners' motions for a directed verdict at the close of

all the evidence; (g) the giving of respondent's instructions to the jury; (h) the refusal of or modification of petitioners' requested instructions; (i) the charge to the jury; (j) the denial of petitioners' motion to set aside the verdict and to enter judgment for the petitioners; (k) the denial of petitioners' motion in arrest of judgment; (l) the denial of petitioners' motion for a new trial; and (m) the entry of judgments on the verdict and the assessment of fines against petitioners.

ARGUMENT.

I.

The practice of medicine and the rendering of medical services[1] are not "commercial" and not "trade" under Section 3 of the Sherman Act.

The decisions below holding that the practice of medicine and the rendering of medical services are trade under the Sherman Act, disregard as "casual" and "not a proper guide" the definition of trade this Court undertook to give in *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 436, that the liberal arts and the learned professions were not in "trade" under Section 3 of the Sherman Act. *Federal Club* v. *National League*, 259 U. S. 200, 209, held that personal effort, not related to production, such as base-

[1] The Court of Appeals concedes (R. 1890), that there is authority for the proposition that private hospitals supported by appropriations and charity are not engaged in trade, business or industry, but concludes, without any support in the evidence, that it has no doubt that the hospitals described in the indictment were engaged in trade within the meaning of the Sherman Act, citing *Jordan* v. *Tashiro*, 278 U. S. 123, 127-129. In the *Jordan* case the articles of incorporation provided for "a business corporation with a share capital of $100,000.00" and the issue was decided under the provisions of a treaty which required the broadest interpretation of the word "trade." Such proof as there was in the record in this case tends to show that the Washington hospitals are non-profit institutions for the care of the sick and their funds are used for that purpose (R. 591, 1338).

ball and the practice of law, is not "trade" under the Sherman Act. Other decisions of this Court, of Circuit Courts of Appeal, and of State Courts without dissent, have held that the learned professions and similar occupations are not "trade."[2] *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 493 (footnote 15), considered the legislative history of the Sherman Act, construed the *Atlantic Cleaners & Dyers* case quite differently than the court below, and held that no activity could be "trade" within the meaning of the Act unless it was "commercial." If the professions be "trades," all statutes regulating professional conduct are subject to attack on constitutional grounds. *Semler* v. *Dental Examiners, et al.*, 294 U. S. 608, 610-612, *Graves* v. *Minnesota*, 272 U. S. 425, 429.

II

"Restraint of trade" under Section 3 of the Sherman Act is not established in this case because it is neither alleged nor proven that the claimed restraints affected the market, either by fixing prices or suppressing competition to the extent that prices were substantially affected, to the injury of the public.

The *Apex* case involved an admitted conspiracy on the part of employees and others and their organizations to

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[2] *Dandridge* v. *Washington's Executors*, 27 U. S. 369, 377; *May* v. *Sloan*, 101 U. S. 231, 237; *Graves* v. *Minnesota*, 272 U. S. 425, 429; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 653; *Semler* v. *Dental Examiners*, 294 U. S. 608, 612; *Toxaway Hotel Co.* v. *Smathers*, 216 U. S. 439, 449; *In Re United States Hotel Co.*, 134 F. 225, 226, 228; *Jeu Jo Wan* v. *Nagle*, 9 F. 2d 309, 310; *Spence* v. *Johnson*, 142 Ga. 267, 82 S. E. 646; *State* v. *McClelland*, 155 La. 37, 98 S. 748; *Whitcomb* v. *Reid*, 31 Miss. 567, 569; *Polhemus* v. *DeLisle*, 98 N. J. Eq. 256, 130 A. 618; *People* v. *Kelly*, 255 N. Y. 396, 175 N. E. 108; *Metropolitan Opera Co.* v. *Hammerstein*, 147 N. Y. S. 532, 162 App. Div. 691, aff'd. 221 N. Y. 507, 116 N. E. 1061; *Iselin* v. *Flynn*, 154 N. Y. S. 133; *First Nat. Bank* v. *Abilene Hotel Co.*, 46 Tex. Civ. App. 595, 103 S. W. 1120; *Crowder* v. *Graham* (Tex. Civ. App.), 201 S. W. 1053; *Werth* v. *Fire Companies Adj. Bureau*, 160 Va. 845, 171 S. E. 255.

seize and shut down the manufacturing plant of an employer, Apex Hosiery Co., with a sit-down strike, destruction of property, stoppage of manufacturing and of interstate shipments, and force and violence of the most brutal and wanton character, but this Court held (p. 481) "that the effect" of such acts would "bring the acts of respondents by which the restriction was effected within the reach of the commerce power *if Congress had seen fit to exercise it*," and then held that the term "restraint of trade" as used in the Sherman Act meant only such activities which had been exercised or used in such a way as to affect the market, either by fixing prices or suppressing competition to the extent that prices were substantially affected, to the injury of the public. The Court then held that there was no evidence that prices had been affected and hence no violation of the Sherman Act. The Court also held that the Sherman Act did not take over the doctrine of restraint of trade at common law in its entirety but only as aforesaid.[3]

In the case at bar, even if the indictment charged and the evidence showed (which is denied) a restraint that tended to impair or destroy GHA, that would not spell out a violation of the Sherman Act, under the *Apex* case and the *Hutcheson* case.[4]

The decisions below, holding that the indictment and the evidence show a violation of the Sherman Act, also con-

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[3] This Court made its holding on this important point emphatic, when it said (p. 500) contracts, combinations or conspiracies are to be condemned under the Sherman Act "only when their purpose or effect was to raise or fix the market price. It is in this sense that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices."

[4] The respondent has conceded that such a charge does not make out a case under the Sherman Act. In the *Hutcheson* case, respondent conceded to this Court that the "closing down of a factory" engaged in an interstate business is not enough to show a violation of the Sherman Act, 312 U. S. 222.

flict with several decisions in the Circuit Courts of Appeal which have examined the scope of the *Apex* decision [5] and with two other Federal decisions.[6] Those cases all squarely hold only such restraints are within the act that restrain commercial activities, the effect of which is to affect the market, either by fixing prices or suppressing competition to the extent that prices are substantially affected to the injury of the public. Those elements are neither pleaded nor proved in this record. There was not a scintilla of evidence to that effect.

In the *Apex* case the Court pointed out that the remedy for wrongs existing outside the proper purview of the Sherman Act must be found in other applicable statutes or laws. Such remedies have been sought under varying types of complaints.[7]

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[5] *International Ladies G. W. Union* v. *Donnelly G. Company*, 119 F. 2d 892, 898; *Gundersheimer's Inc.* v. *Baker, etc., I. Union*, 73 App. D. C. 352, 353, 119 F. 2d 205, 206; *United States* v. *Local 807 of I. Brotherhood, etc.*, 118 F. 2d 684-689, affirmed March 2, 1942, — U. S. —; *International Ass'n. etc.* v. *Pauly Jail Bldg. Co.*, 118 F. 2d 615, 621; *United States* v. *Gold*, 115 F. 2d 236-238.

[6] *Konecky* v. *Jewish Press*, 288 F. 179; and *Swartz* v. *Forward Ass'n.* 41 F. Supp. 294.

[7] The prosecution in this case was conceived in the opinion of a judge of a trial court in England, *Pratt* v. *British Medical Association*, 1 K. B. (1919) 244. That opinion arose out of an action in tort for damages on the theory that defendants maliciously conspired to injure plaintiff doctors. Actual malice and social persecution were involved. The judgment for plaintiffs was not appealed. Three years later the Appellate Division of the Kings Bench in the case of *Ware and DeFreville* v. *Motor Trade Association*, 3 K. B. (1921) 40, severally criticized the Pratt opinion, stating it was "quite impossible to harmonize" it with other decisions. Our American courts without dissent have held in private actions, both legal and equitable, based upon alleged torts asserted to have been committed in the enforcement of rules and regulations of medical societies and hospitals, that such cases do not present a basis for relief. *Bryant* v. *District of Columbia Dental Society*, 26 App. D. C. 461; *Newton* v. *Board of Commissioners*, 86 Colo. 446, 282 P. 1068; *Olander* v. *Johnson*, 258 Ill. App. 89; *Irwin* v. *Lorio*, 169 La. 1090, 126 S. 669; *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432; *Weyrens* v. *Scotts Bluff County Medical Society*,

III

A dispute concerning terms and conditions of employment under Clayton and Norris-LaGuardia Acts was involved in this case, in which petitioners were interested. The case is therefore not within the Sherman Act.

If petitioners' doctor-members be "tradesmen", the record shows a dispute or controversy concerning terms and conditions of employment in which petitioners were interested.

When a subcommittee of the Executive Committee of DMS and representatives of GHA conferred for the first time (R. 290-309) a controversy arose, the matrix of which was the terms and conditions of employment by GHA of members of DMS to perform GHA's corporate medical work. GHA rejected an offered basis of employment of members of DMS, insisted upon dictating the terms, conditions, and method of payment of compensation and of employing members of DMS, regardless of whether GHA's plans were illegal or in conflict with the constitution and employment rules of DMS. This controversy over terms and conditions of employment continued throughout the indictment period and was involved in all of the activities charged or proven; hence because of the Clayton and Norris-LaGuardia Acts this case is not within the Sherman Act. *United States* v. *Hutcheson*, 312 U. S. 219; *United States* v. *Carrozzo*, 37 Fed. Supp. 191, affirmed 313 U. S. 508; *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552; *Drivers Union* v. *Lake Valley Co.*, 311 U. S. 91;[8] and

133 Neb. 814, 277 N. W. 378; *Branagan* v. *Buckman*, 67 Misc. 242, 122 N. Y. S. 610, affirmed 130 N. Y. S. 1106; *Strauss* v. *Marlboro County General Hospital*, 185 S. C. 425, 194 S. E. 65; *Harris* v. *Thomas* (Tex. Civ. App.), 217 S. W. 1068; *Porter* v. *King County Medical Society*, 186 Wash. 410, 58 P. 2d 367.

[8] And compare "labor dispute" immunity conferred by Anti-Racketeering Act as interpreted in *United States* v. *Local 807 of I. Brotherhood, etc.*, decided March 2, 1942, —— U. S. ——.

the plain language of the Clayton and Norris-LaGuardia Acts.

If doctors be in trade, it necessarily follows that Secs. 6 and 20 of the Clayton Act are applicable. Sec. 6 provides that the labor of a human being is not a commodity of commerce. Sec. 20 of the Act covers all employers and employees including corporations and associations and, as expanded by Sec. 13 of the Norris-LaGuardia Act, includes all persons and associations involved in a dispute over terms or conditions of employment who are engaged in the same industry, *trade*, craft or *occupation*, or have direct or indirect interests therein. The Acts cover any third party, even though that party be a corporation not in trade [9] and employers and their associations [10] even if only *indirectly* interested in the controversy. The Clayton and Norris-LaGuardia Acts cannot logically be confined exclusively to the laborer who works for wages.[11]

As GHA's wilful employment of doctor-members of DMS (and AMA) and the terms and conditions of such employment was the matrix of this controversy,[12] it follows that the acts charged or proven to petitioners are not within the Sherman Act. The holding below that petitioners are not within the Clayton and Norris-LaGuardia Acts conflicts with another decision of the court below and two decisions of the Eighth Circuit.[13]

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[9] *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552.

[10] *Drivers Union* v. *Lake Valley Co.*, 311 U. S. 91, 93, 94.

[11] The court below held the word "trade" in the Sherman Act is broad enough to include the professions, but holds that the words "industry", "trade", "craft" or "occupation", in the Norris-LaGuardia Act are not broad enough to include them.

[12] *Columbia River Packers Assn.* v. *Hinton*, 315 U. S. 143, 147.

[13] *Gundersheimers, Inc.*, v. *Bakery, etc., I. Union*, 73 App. D. C. 352, 353, 119 F. 2d 205, 206; *International Ladies G. W. Union* v. *Donnelly G. Co.*, 119 F. 2d 892, 898; *International Assn.* v. *Pauly Jail Bldg. Co.*, 118 F. 2d 615, 620. And compare *United States* v. *Local 807 of I. Brotherhood, etc.*, 118 F. 2d 684, 686, 689, affirmed March 2, 1942, —— U. S. ——.

IV

The activities of GHA, charged to have been restrained, were illegal in that GHA was engaged in the corporate practice of medicine and in an insurance operation contrary to law. These facts were a complete defense as a matter of law, or at least admissible in evidence for the consideration of the jury.

On February 24, 1937, three lay persons filed a certificate of incorporation for the purpose of incorporating GHA.[14] Its activities were to be managed and controlled by a board of trustees (R. 1224).[15]

The by-laws provided for the employing and hiring of "corporation doctors" as GHA planned to render medical services to members and their dependents (R. 1232, 1341-1343, 1245-1247, 1249, 1251-1255). The evidence showed without conflict or dispute that GHA employed full-time doctors by the month, who were not permitted to have private practice (R. 293), to work in its clinic and render medical services to its members, who paid monthly dues therefor to GHA. The statement of the Court of Appeals that GHA's salaried, employee, full-time doctors were independent contractors or were called when needed has no support in the evidence.

While the Court of Appeals placed much reliance on the theory that GHA was not practicing medicine because it was a non-profit corporation, we insist that that is beside the point. (On the first appeal the Government

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[14] Under the District of Columbia Code (1940) Title 29, Secs. 29-601 to 29-606 for the incorporation of charitable, educational and religious associations.

[15] At no time during the indictment period did the by-laws require that any trustee be a doctor, and during that time no doctor was a member of the board of trustees.

argued that GHA was a profit-making corporation. Brief pp. 26, 46). If a corporation is rendering medical services and illegally practicing medicine, it is wholly immaterial whether it was organized for profit or not for profit. Corporations not for profit can no more obtain a license to practice medicine than a corporation for profit. Congress made no distinction between the types of corporations involved and under the Healing Arts Practice Act confined the practice of medicine to licensed qualified physicians.[16]

Moreover, membership corporations, like GHA, organized not for profit, illegally practice medicine or law when they employ doctors or lawyers on a salary basis to render medical or legal services to their members.[17]

Nor is it material that the corporation is formed along cooperative or association lines with members or subscribers; and such corporations, when they employ doctors or lawyers on a salary basis to render medical or legal services to their members or subscribers, are illegally engaged in the practice of medicine or law.[18]

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[16] The Healing Arts Practice Act is all-inclusive and comprehends every kind and character of medical treatment. Appendix pp. 59, 60 *infra*.

[17] *Merrick* v. *American Automobile Assn.* (D. C. D. C.), 31 F. Supp. 876; *People* v. *Association of Real Estate Tax Payers of Illinois*, 354 Ill. 102, 187 N. E. 823; *People* v. *Motorists Assn. of Illinois*, 354 Ill. 595, 188 N. E. 827; *People* v. *Chicago Motor Club*, 362 Ill. 50, 199 N. E. 1; *Seawell* v. *Caroline Motor Club and American Automobile Assn.*, 209 N. C. 624, 184 S. E. 540; *Richmond Assn. of Credit Men* v. *Bar Assn.*, 167 Va. 327, 189 S. E. 153.

[18] *People* v. *Pacific Health Corp.*, 12 Cal. 2d 156, 82 P. 2d 429, cert. den. 306 U. S. 633; *People* v. *Merchants Protective Corp.*, 189 Cal. 531, 209 P. 363; *Masters* v. *Board of Dental Examiners*, 15 Cal. App. 2d 506, 59 P. 2d 827; *People* v. *Cal. Protective Corp.*, 76 Cal. App. 354, 244 P. 1089; *Depew* v. *Wichita Assn. of Credit Men*, 142 Kans. 403, 49 P. 2d 1041, cert. den. 297 U. S. 710; In re *Maclub of America*, 295 Mass. 45, 3 N. E. 2d 272; *In re Co-operative Law Co.*, 198 N. Y. 479, 92 N. E. 15; *Rhode Island Bar Assn.* v. *Automobile Service Assn.*, 55 R. I. 122, 179 A. 139; *State* v. *Credit Men's Assn.*, 163 Tenn. 450, 43 S. W. 2d 918; *State* v. *Merchants Protective Corp.*, 105 Wash. 12, 177 P. 694.

The decision of the Court of Appeals conflicts with every respectable authority in this country, as the fundamental test seems to be that if a corporation hires or employs a doctor or a lawyer to render medical or legal services to members, customers, or to any person or party other than the corporate entity itself, it is illegally practicing medicine or law.[19]

As it was conceded that GHA had a profit object and there was evidence showing that the ordinary relationship between physician and patient was lost as GHA was prac-

[19] *Parker* v. *Board of Dental Examiners*, 216 Cal. 285, 14 P. 2d 67; *Pacific Employers Insurance Co.* v. *Carpenter*, 10 Cal. App. 2d 592, 52 P. 2d 992; *Benjamin Franklin Life Assurance Co.* v. *Mitchell*, 14 Cal. App. 2d 654, 58 P. 2d 984; *People* v. *Painless Parker Dentist*, 85 Col. 304, 275 P. 928, cert. den. 280 U. S. 566; *State Board of Dental Examiners* v. *Savelle*, 90 Col. 177, 8 P. 2d 693; *People* v. *Denver Clearing House Banks*, 99 Col. 50, 59 P. 2d 468; *Boykin* v. *Hopkins*, 174 Ga. 511, 162 S. E. 796; *People* v. *Peoples Stockyard State Bank*, 344 Ill. 462, 176 N. E. 901; *Allison* v. *Allison*, 360 Ill. 638, 196 N. E. 799; *People* v. *United Medical Service*, 362 Ill. 442, 200 N. E. 157; *State* v. *Boston System Dentist*, (Ind.) 19 N. E. 2d 949; *State* v. *Bailey Dental Co.*, 211 Iowa 781, 234 N. W. 260; *State* v. *Kindly Optical Co.*, 216 Iowa 1157, 248 N. W. 332, *Winslow* v. *State Board*, 115 Kans. 450, 223 P. 308; *Johnston* v. *Stumbo*, 277 Ky. 301, 126 S. W. 2d, 165; *In re Opinion of the Justices*, 289 Mass. 607, 194 N. E. 313; *In re Shoe Mfrs. Protective Assn.*, 295 Mass. 369, 3 N. E. 2d 746; *McMurdo* v. *Getter*, 298 Mass. 200, 10 N. E. 2d 139; *Detroit Bar Assn.* v. *Union Guardian Co.*, 282 Mich. 216, 276 N. W. 365; *In re Otterness*, 181 Minn. 254, 323 N. W. 318; *State* v. *St. Louis Union Trust Co.*, 335 Mo. 845; 74 S. W. 2d 348; *State* v. *C. S. Dudley and Co.*, 340 Mo. 852; 102 S. W. 2d 895; *State* v. *Merchants Credit Service*, 104 Mont. 76, 66 P. 2d 337; *Unger* v. *Landlord's Management Corp.*, 144 N. J. Eq. 68, 168 A. 229; *People* v. *Warden*, 152 N. Y. Supp. 977, 168 App. Div. 240; *Stern* v. *Flynn*, 278 N. Y. Supp. 598; *In re Tuthill*, 10 N. Y. Supp. 2d 643; *U. S. Title Guaranty Co.* v. *Brown*, 217 N. Y. 628, 111 N. E. 828; *Land Title and Abstract Co.* v. *Dworken*, 129 Oh. St. 23, 193 N. E. 650; *Rowe* v. *Standard Drug Co.*, 132 Oh. St. 629, 9 N. E. 2d 609; *Judd* v. *City Trust & Savings Bank*, 133 Oh. St. 81, 12 N. E. 2d 288; *Public Service Traffic Bureau, Inc.* v. *Haworth Marble Co.*, 40 Oh. App. 255, 178 N. E. 703; *Neill* v. *Gimbel Bros.*, 330 Pa. 213, 199 A. 178; *Ezell* v. *Ritholz*, 188 S. C. 39, 198 S. E. 419, *State* v. *James Sanford Agency*, 167 Tenn. 339, 69 S. W. 2d 895; *State* v. *Clinic*, 186 Wash. 384, 58 P. 2d 812; *Eisensmith* v. *Buhl Optical Co.*, 115 W. Va. 776, 178 S. E. 695.

ticing medicine wholesale (R. 950, 951), the decision below is unsound and conflicts with earlier decisions of that court.[20] As the restraints charged primarily concerned the activities of GHA in the practice of medicine and the rendering of medical services, the illegality of GHA's practice should be a complete defense. In *Citizens' Who. Gro. Co.* v. *Snyder*, 201 F. 907, it was held that a restraint under an ordinance believed to be valid, but subsequently held invalid, would not support a suit under the Sherman Act.

The Court of Appeals held that GHA could lawfully maintain a medical clinic and render medical services through employed, full-time, salaried doctors without violating Federal statutes or illegally practicing medicine, and also held that even if GHA was illegally practicing medicine, that fact was immaterial, not admissible in evidence and not arguable to the jury. This on the theory that a restraint on an illegal activity violates the Sherman Act. The Court of Appeals cites as an example that it is a crime to conspire to dynamite a house of ill repute, but we submit that does not amount to saying that it would be restraint of the trade of a house of ill repute if a medical association expelled its members who frequented such a place or accepted employment from it for the purpose of furthering its illegal activities. Moral turpitude and criminal activities have always been grounds for expulsion from medical and legal societies.

The opinion is not sound when it holds that the illegality of GHA is immaterial and inadmissible and hence a medical association restrains trade when it expels a member

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[20] *Merrick* v. *American Security & Trust Co.*, 71 App. D. C. 72, 107 F. 2d 271, 276; *Silver* v. *Lansburgh Bro.*, 72 App. D. C. 77, 111 F. (2d) 518.

for accepting employment from an activity in which both the member and his employer violate Federal statutes.[21]

GHA was engaged also in an insurance operation contrary to law. It was incorporated to furnish and pay for medical services and hospitalization (R. 1241-1244). Upon the happening of a contingency, in exchange for dues, GHA paid for (or furnished) medical services and hospitalization (R. 298, 305).[22]

Thus GHA made contracts with its members (R. 298, 305) for the payment of an indemnity on account of sickness or accident, on the happening of certain contingencies, in exchange for dues. That was engaging illegally in an insurance operation.[23]

[21] *Fashion Guild* v. *Trade Commission*, 312 U. S. 457, is not an authority to the contrary. The remark of the court as to torts was obiter, as no tort existed. The persons restrained were engaged in lawful business, and the claimed evil was only one element therein. Morover, a tort, under state law, is not the same as violations of Federal statutes. Here all parties are under Federal statutes, and the complete activity of GHA was inherently illegal. The Sherman Law should not be construed to protect, against restraints, activities that are in violation of Federal statutes. See Sec. 8 of the Norris-LaGuardia Act, Appendix p. 58 *infra*, to the effect that injunctive relief cannot be granted to any complainant who has failed to comply with any obligation imposed by law if complainant is involved in a dispute within that Act.

[22] Insurance operations in the District are defined by the Act of March 3, 1901, as amended (D. C. Code 1940, Title 35, Sec. 35-202) which provides:

"Every corporation . . . transacting business in the District of Columbia, which collects premiums, dues, or assessments from its members, or from holders of its certificates or policies, and which provides for the payment of indemnity on account of sickness or accident, or a benefit in case of death, shall be known as 'health, accident, and life insurance companies or associations'."

Concededly GHA had *not* qualified under this Act.

[23] *Physicians' Defense Co.* v. *Cooper*, 199 F. 576; *Allin* v. *Motorists' Alliance*, 234 Ky. 714, 29 S. W. 2d 19; *State* v. *Bean*, 193 Minn. 113, 258 N. W. 18; *Physicians' Defense Co.* v. *O'Brien*, 100 Minn. 490, 111 N. W. 396; *People* v. *Standard Plate Glass Co.*, 153 N. Y. S. 1012; *Renschler* v. *State*, 90 Oh. St., 363, 107 N. E. 758; *State* v. *Mutual Mortuary Assn.*, 166 Tenn. 266, 61 S. W. 2d 664; *National Auto Service Corp.* v. *State* (Tex. Civ. App.), 55 S. W. 2d 209; *State* v. *Globe Casket & Undertaking Co.*, 82 Wash. 124, 143 P. 878.

GHA, on the present record, cannot be within any of the exemptions provided for by law as it is not a relief association, and its membership included employees in more than forty different agencies and bureaus.[24]

V

The motion of the petitioners for judgment notwithstanding the verdict, or in the alternative for a new trial, should have been granted.

The jury brought in an anomalous verdict, acquitting all twenty-one individual defendants and convicting AMA and DMS despite the fact that all acts done, which had any tendency to support the indictment, were committed by the individual defendants. Any responsibility so far as AMA and DMS are concerned must rest upon the doctrine of imputation. There is therefore no evidence to support the verdict.

After verdict petitioners filed suitable motions which presented the following propositions.

1. In determining whether there is competent evidence in the record sufficient to sustain the conviction of petitioners, all testimony relating to the acquitted individual defendants must be disregarded. All of the testimony as to the individual defendants was received in evidence under the co-conspirator rule and was not otherwise admissible. Obviously, the verdict of not guilty was a definite finding that such individual defendants were not co-conspirators, and, therefore, there was no basis left upon which the evidence submitted was competent. If a new trial were had, none of the evidence as to the acts of the individual defend-

[24] To be exempt from the Insurance Code, GHA would have to be a relief association composed solely of employees of a single branch of the United States Government service or solely of employees of any individual, company, firm, or corporation (D. C. Code 1940, Title 35, Section 35-202).

ants would be admissible, and AMA and DMS would have to answer only for their own acts. Under such circumstances the testimony of acquitted defendants should not be available in support of the conviction of the AMA and DMS, and the decisions so hold.[25] By analogy, where two persons are charged with conspiracy and one is acquitted, the evidence against such acquitted defendant is no longer available to convict the remaining defendant, and hence the other defendant must be released.[26]

Likewise in *respondeat superior* cases where the agent or servant who performed the act has been released, evidence pertaining to his acts and doings cannot be used to establish a liability against the master, and the case against the master must be dismissed.[27] The point is that the verdict of the jury has destroyed the basis under which the testimony was admissible; therefore it must be ignored in passing on the guilt or innocence of another defendant.

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[25] *Clark* v. *United States*, 61 F. (2d) 409, 410; *Hohenadel Brewing Co.* v. *United States*, 295 F. 489, 490; *Pope* v. *United States*, 289 F. 312, 315; *Stager* v. *United States*, 233 F. 510, 513.

[26] *Worthington* v. *United States*, 64 F. 2d 936, 939; *Didenli* v. *United States*, 44 F. 2d 537, 538; *Grove* v. *United States*, 3 F. 2d 965, 967; *Williams* v. *United States*, 282 F. 480, 484; *Miller* v. *United States*, 277 F. 721, 726; *Feder* v. *United States*, 257 F. 694, 696.

[27] *Buckeye Powder Co.* v. *Dupont de Nemours Powder Co.*, 248 U. S. 55, 62; *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111, 133; *Union Trust Co.* v. *Woodrow Mfg. Co.*, 63 F. 2d 602, 605, 606; *Rosenzweig & Sons* v. *Jones*, 50 Ariz. 303, 72 P. 2d 417; *Stanton* v. *Arkansas Democrat Co.*, 194 Ark. 135, 106 S. W. 2d 584; *Jentick* v. *Pacific Gas & Elec. Co.*, (Cal.) 114 P. 2d 343; *Johnson* v. *The City of San Fernando*, 35 Cal. App. 2d 244, 95 P. 2d 147; *People* v. *Angelopoulos*, 30 Cal. App. 2d 538, 86 P. 2d 873, 878; *Williams* v. *Hines*, 80 Fla. 690, 86 S. 695; *Roadway Express* v. *McBroom*, 61 Ga. App. 505, 6 S. E. 2d 460; *Territory* v. *Thompson*, 26 Hawaii 181; *J. F. Martin Cartage Co.* v. *Dempsier Bros.*, 311 Ill. App. 70, 35 N. E. 2d 391; *Kelly* v. *Powers*, 303 Ill. App. 198; *Holbrook* v. *Nolan*, 105 Ind. App. 75, 10 N. E. 2d 744; *Hall* v. *Miller*, 212 Ia. 835, 235 N. W. 298; *Lahr* v. *Chicago & N. W. Ry. Co.*, 212 Ia. 544, 234 N. W. 223; *Blue Valley Creamery Co.* v. *Cronimus*, 270 Ky. 496, 110 S. W. 2d 286; *Illinois Central Ry. Co.* v. *Applegate's Admx.*, 268 Ky. 458, 105 S. W. 2d 153;

2. Any corporate liability for crime must rest on the doctrine of imputed guilt. This necessitates a precedent guilt in the individual actor for whose act the corporation is responsible.[28] What was done in this case was done by the individual defendants, and corporate guilt must come through those acts.[29] The acquittal of the individual defendants by the jury is a conclusive finding that the acts done by them were not criminal, and therefore noth-

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Giedrewicz v. *Donovan*, 277 Mass. 563, 569, 179 N. E. 246, 248; *Presley* v. *Central Terminal Co.*, (Mo. App.) 142 S. W. 2d 799; *Beck* v. *Moll*, (Mo. App.) 102 S. W. 2d 671; *Bingham* v. *National Bank of Montana*, 105 Mont. 159, 72 P. 2d 90; *Bohmont* v. *Moore*, 138 Neb. 784, 295 N. W. 419; *Prendergast* v. *Jacobs*, 110 N. J. Law 435, 166 A. 94; *United States* v. *Santa Rita Store Co.*, 16 N. Mex. 3, 113 P. 620; *Good Health Dairy Products* v. *Emery*, 275 N. Y. 14, 9 N. E. 2d 758; *Pangburn* v. *Buick Motor Co.*, 211 N. Y. 228, 105 N. E. 423; *Thibodeau* v. *Gerosa Haulage & Warehouse Corp.*, 252 App. Div. 615, 300 N. Y. S. 686; *People* v. *Safeway Coal Co.*, 242 App. Div. 659, 272 N. Y. S. 658; *Agoado* v. *Cohen, et al.*, 234 App. Div. 37, 254 N. Y. S. 134; *Hudson* v. *Gulf Oil Co.*, 215 N. C. 422, 2 S. E. 2d 26; *Leary* v. *Virginia-Carolina Joint Stock Land Bank*, 215 N. C. 501, 2 S. E. 2d 570; *Anthony* v. *Covington*, 187 Okla. 27, 100 P. 2d 461; *Feazle* v. *Industrial Hospital Association*, 164 Ore. 630, 103 P. 2d 300; *Brobston* v. *Burgess & Town Council*, 290 Pa. 331, 138 A. 849; *Carter* v. *Atlantic Coast Line R. Co.*, 194 S. C. 494, 10 S. E. 2d 17; *Summers* v. *Bond-Chadwell Co.*, 24 Tenn. App. 357, 145 S. W. 2d 7, cert. den. 145 S. W. 2d 7; *McLaughlin* v. *Chief Consolidated Mining Co.*, 62 Utah 532, 220 P. 726; *Schosboek* v. *Chgo. M. St. P. & P. R. Co.*, 191 Wash. 425, 71 P. 2d 548.

[28] 10 Fletcher, Cyclopedia of Corporations, Sec. 4944; *New York Central and H. RR Co.* v. *United States*, 212 U. S. 481, 491, 497; *Mininsohn* v. *United States*, 101 F. 2d 477, 478; *Rockwood Corp.* v. *Brick Layers Local Union*, 33 F. 2d 25, 27; *Robert E. Hicks Corp.* v. *National Salesmen's T. Assn.*, 19 F. 2d 963, 964, 965; *United States* v. *Nearing*, 252 F. 223, 231; *Union Pacific Coal Co.* v. *United States*, 173 F. 737, 745; *United States* v. *Santa Rita Store Co., et al.*, 16 N. Mex. 3, 113 P. 620; *People* v. *Safe-way Coal Co.*, 242 App. Div. 659, 272 N. Y. S. 658.

[29] The Court of Appeals is in error when it holds that a corporation can be guilty of crime without the intervention of any human being. It may be that if a statute requires a corporation to do some affirmative act under penalty and the corporation does not comply with the statute, it could be guilty of a crime. But in no other respect could a corporation be guilty of crime without a human act being involved. Especially is this true under a charge of conspiracy which is essentially a crime of intent.

ing remains to be imputed to the corporation. It is true the indictment names "unknown" defendants, but the record is wholly barren with reference to any person or persons other than the individual defendants to substantiate any claim of conspiracy.[30]

Consequently, eliminating the testimony of the acquitted defendants, as we must, we are faced here with a total failure of proof to establish any offense on the part of AMA or DMS.

3. Ignoring, arguendo, the propositions just considered, we submit that the presence in the record of highly controversial testimony relating to and coming from the individual defendants was in itself so prejudicial as to require the setting aside of the judgment against petitioners and granting a new trial.[31] Much of the testimony as to

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[30] This differentiates this case from *United States* v. *General Motors Corporation*, 121 F. 2d 376, in which case the court pointed out that there was sufficient additional testimony, *not coming from the acquitted defendants*, to sustain the verdict. Nor is this situation one involving the rule as to inconsistent verdicts announced in *Dunn* v. *United States*, 284 U. S. 390, and the cases following it. Each of those cases was specifically based upon the theory of multiple counts in an indictment wherein each count amounted to a separate offense, and because of that fact inconsistency of verdicts between counts was held to be immaterial. Here there is but a single count, and obviously the rule in the *Dunn* case is not applicable. The decision in *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, is also not in point because in that case it appears clearly that the acquittal of the two Government agents had no necessary factual connection with the conviction of the other defendants. The inconsistency of verdict there was only argumentative.

[31] *United States* v. *Standard Oil Co.*, 23 F. Supp. 937, 939, which seems to have approval on this point in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 243; *Wilson* v. *United States*, 109 F. 2d 895, 896; *Collenger* v. *United States*, 50 F. 2d 345, 347-351.

If there ever was a case where the evidence pertaining to the acts and doings of the alleged co-conspirators found "not guilty" was of such volume and of such a prejudicial nature as to deprive the defendants found "guilty" of an adequate separate consideration of their defense, this is it. The mass of statements made by members of DMS and by committee members of

the acts of the individual defendants offered by the Government to prove that they were engaged in a criminal conspiracy was exceedingly prejudicial in its nature. Such a prejudicial record departs from the American conception of a fair and impartial trial. We think it patently impossible to believe that any jury which had received and heard such prejudicial testimony could possibly have weighed and determined the guilt of AMA and DMS separate and apart from and without reference to the effect on their minds of the prejudicial testimony relating to the individual defendants. We think societies of the reputation and standing of AMA and DMS are fairly entitled to have had the jury pass upon the question of their guilt or innocence under circumstances where their responsibility received a fair separable consideration by the jury, upon the evidence competent and relevant as to them. Such a result was here humanly impossible for the reasons stated, hence a new trial should have been granted.

4. Besides the questions arising out of the verdict, petitioners contend that the evidence is generally insufficient, even if considered as a whole, to sustain any verdict of guilty for the reasons heretofore set forth in the petition. The case is without substance under the Sherman Act and equally without substance, in fact, as showing that the defendants committed any act other than peaceful argument and persuasion. The whole theory of the Government was that if anyone was antagonistic to GHA, disapproved or said anything critical about it, such fact raised a jury question as to resulting restraints, and if the members of petitioners in their meetings expressed objections

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DMS as set forth in the minutes of DMS and its committees which was admitted against all the defendants in this case is amply sufficient to entitle these petitioners to a new trial. Other examples of prejudice are the great mass of background evidence, and the letters, statements, and other activities of the individual defendants.

to or disapproval of GHA then the concert of minds at such meetings was insisted by the Government to be sufficient proof to establish conspiracy against petitioners. The Court of Appeals in its first opinion specifically stated that the defendants were entitled to show that their acts were reasonable regulations of professional practice, and yet the very discussion of what the defendants thought it necessary to do in their own protection is charged as sufficient basis from which a jury can find a criminal conspiracy. Likewise the Court of Appeals holds in its first and second opinions that petitioners had full rights of argument and persuasion, yet when they attempt to exercise either right they are met with the contention that they were restraining GHA in violation of the Sherman Act. The doctrine contended for by the Government would destroy the efficiency of every voluntary organization formed for the protection of the interests of its members, and would prohibit any criticism of GHA.

Obviously, we cannot here set forth at length, detail upon detail, the evidence contained in the very lengthy record in this case. But we desire to make it perfectly clear that we are contending to the Court here that the entire record is utterly insufficient to sustain the charge.

VI.

The court erred in receiving certain evidence on behalf of the United States.

(a) There was received in evidence so-called "background" evidence concerning various actions taken by the AMA throughout the United States, antedating by many years the alleged conspiracy described in the indictment, without any effort being made whatever to prove the nature and kind of the plans involved in the actions at the faraway places or whether such plans were good or evil or bore any

resemblance to GHA. Moreover, such acts were unknown to DMS. Such evidence did not pertain to acts which were unlawful where done. The rulings below conflict with *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 358; *Wilson* v. *United States*, 109 F. 2d 895, 896, and *Eastern States Petroleum Co.* v. *Asiatic P. Corp.*, 103 F. 2d 315, 319. The conviction of petitioners might well be the definite result of the admission of this evidence. The *Chicago Board of Trade* case cited to support the decision below is obviously not in point. The "background" there was in the same jurisdiction, was immediate in point of time, concerned the sole defendant, and related to the precise acts presently involved in the action of the Board. The same is true of the other cases cited by the Court of Appeals on this point. After petitioners' motion to strike such evidence was denied, their requested instructions (R. 1485, 1486, 1492) limiting the probative force of such evidence were refused.

(b) The minutes of DMS, made up by the secretary, who was a defendant, from recollection, contained summaries of alleged statements made by individual defendants, and letters, statements and memoranda were attached thereto. On the theory that the secretary was a co-conspirator, the minutes were accepted as evidence to show that the recorded statements of members were, in fact, made and thereby constituted such members also co-conspirators. The statements made by such members were the discussions, arguments, and statements commonly and usually made in society meetings when discussing matters in which those present were interested. Such evidence was hearsay and should have been rejected on petitioners' objection.

(c) Petitioners objected to the statements, letters, and memoranda of the subordinate employees of the hospitals and of the doctors and interns on the staffs of the hospitals who were not even employees of said hospitals, which were

offered for the purpose of showing that the hospitals were prima facie parties to the alleged conspiracy or for the purpose of showing what the hospitals did, if and when there was a prima facie showing that the hospital was a party to the conspiracy. This evidence was not admissible because such persons were not agents of the hospitals and had no authority to bind the hospitals, and the evidence had no tendency to prove prima facie that the hospitals were parties to the alleged conspiracy. All of such evidence was pure hearsay. Because the hospitals refused privileges to GHA doctors, that fact was asserted sufficient to show a conspiracy between petitioners and the hospitals, although the hospitals were independent corporations and specifically denied any such connection. There is no evidence in the record to support a finding of conspiracy between petitioners and the hospitals.

(d) In a similar way a great mass of evidence was admitted relating to Harris County Medical Society, Washington Academy of Surgery, and Drs. Martel and Young, all of whom were found "not guilty" by directed verdict. Much of this evidence was "hospital" evidence. Damaging evidence pertaining to the activities of these discharged defendants was admitted over objection in the first instance, and then after the record had been permanently poisoned by the admission of such evidence the court directed a verdict in their favor at the close of the Government's case. But the damage had already been accomplished. The evidence of their activities could not have been prima facie evidence that they were co-conspirators, or the court could not have directed a verdict in their favor. Petitioners' motion to strike the "hospital" evidence was denied.

VII

The court erred in refusing evidence offered by petitioners.

The indictment in more than a score of instances charged that the petitioners did the acts complained of "for the

purpose of" restraining GHA. Petitioners denied they had any such purpose, but asserted that on the contrary their purpose was simply to enforce their agreements for self discipline of their members and to protect and defend their own organizations against the proselyting efforts of GHA. In pointing out the purpose actuating petitioners, it, therefore, was essential to show what kind of an organization GHA was and what its acts were which might definitely characterize it. One of the charges made against petitioners was that GHA was refused "approval" and thereby prevented, under society laws, from business engagements or professional consultations with society members and that this approval was withheld in order to restrain GHA. Petitioners took sharp issue and insisted that it was the illegal, improper, and unethical status of GHA which was the reason for the non-approval of employment by GHA of petitioners' members and that the question of approval had reference only to the enforcement of agreed rules and regulations consented to by those members. If GHA's activities were illegal and petitioners' members accepted employment from it for the purpose of furthering such activities, they would be equally guilty with GHA of violating the law.[32]

The Government objected to the receipt of evidence intended to show the character and illegality of GHA, asserting petitioners' purpose was immaterial if GHA was restrained. The court sustained the position of the Government in its entirety and refused to permit petitioners to introduce the desired evidence or to argue such questions to the jury. During the trial, for the purpose of clarifying the issue, petitioners presented to the court written and

[32] The proffered evidence was also admissible to show that GHA ran afoul of Sec. 8 of the Norris-LaGuardia Act, appendix, p. 58 *infra*, which is to the effect that injunctive relief cannot be granted to any complainant who has failed to comply with any obligation imposed by law, if complainant is involved in a dispute within the Act.

oral offers of proof,[33] which tended to prove the following ultimate facts:

(a) that GHA was engaged in the corporate practice of medicine contrary to law, and was engaged in an insurance operation contrary to law, and was otherwise violating Federal statutes, and that it had been so held by public officials and private legal opinion, and petitioners so believed;

(b) that GHA was subsidized by public funds contrary to law and by private funds; was an instrumentality of a plan to destroy the private practice of medicine; was economically and financially unsound; sold medical services below cost; and was in unfair competition with the doctors who were members of the petitioning medical societies;

(c) that GHA was receiving and expending money of Home Owners Loan Corporation[34] and using Federal purchasing discounts contrary to law; and that a committee of the House of Representatives of Congress (R. 1420) and the Comptroller General of the United States had so held (R. 918-920), and petitioners so believed;

(d) that GHA was conspiring with HOLC to violate a Federal statute[35] pertaining to the assignment of wages of Federal employees, and conspiring with HOLC to defraud the United States in taking money of HOLC for the purpose of its operations; and that the Comptroller General of the United States had so held, and petitioners so believed;

(e) that coercion was used on behalf of GHA to cause employees of HOLC, the Federal Savings and Loan Insurance Corporation, and Federal Home Loan Bank Board, to become members of GHA;

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[33] R. 910-920, 940-945, 961, 1011, 1013-1025, 1355, 1356, 1363, 1420, 1429-1435, 1438, and 1440.

[34] Hereinafter referred to as HOLC.

[35] The assignments of the wages and salaries of employees of HOLC to GHA were invalid. R. S. Sec. 3477, May 27, 1908, c. 406 (35 Stat. 411), 31 U. S. C. 203. The Comptroller General so held (R. 919, 920).

(f) that GHA and others on its behalf solicited employees of HOLC and other departments of the United States Government to become members of GHA;

(g) that GHA advertised for members;

(h) that GHA violated the Constitution, By-Laws, Rules, and Principles of Medical Ethics of DMS, and the Principles of Medical Ethics of the AMA and of the medical profession;

(i) that GHA could not, as set up, render good medical services and was not rendering good medical services, and was not rendering the medical services which it agreed to render;

(j) that the intent and purpose of the petitioners were not as charged in the indictment, but on the contrary were to protect their members, their societies, and their constitutions, by-laws, rules and principles of medical ethics; and

(k) that the alleged contemplated restraints were not unreasonable restraints and not direct restraints.

The court denied the proffered evidence and refused to permit any argument to the jury thereon.

We think the refusal by the trial court of petitioners' proffered evidence was obviously erroneous. The decision in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, reversed a similar ruling made on behalf of the Government and said (p. 238):

> "The history of restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. The District Court erred, therefore, in striking from the answer allegations concerning the history and purpose of the Call rule and later in excluding evidence on the subject."

The proffered evidence was not merely reasons or excuses for what was done. It went to the very heart of the intent and purpose of petitioners and also to the reasonableness and directness of the alleged restraint. The intention and purpose of petitioners were to protect their societies, their constitution, by-laws, rules, and principles of medical ethics, and the illegality of the practices of GHA, if true, struck at the very heart of these things. From a great mass of evidence, all of which was perfectly legal in and of itself, the Government insisted upon an ulterior evil intent and purpose. Since legality is to be presumed, the evidence offered should have been admitted in order to establish that such lawful acts were done for lawful purposes.

The proffered evidence also went to the question whether the alleged restraints affected the market either by fixing prices or suppressing competition to the extent that prices were substantially affected, to the injury of the public.

VIII

The court erred in refusing instructions requested by petitioners and in charging the jury.

Many of the petitioners' requests for instructions to the jury were refused, and many requests of the Government were, over objection, granted. The charge followed the Government's theory of the case. The discussion between court and counsel pertaining to the requested instructions (R. 1456-1496) disclosed the theories of the prosecution and the defense.

The Court of Appeals erroneously affirmed the action of the trial court in refusing to charge at petitioners' request as follows: that a conspiracy to be a violation of the Act must, by reason of purpose or intent prejudice the public interests by unduly restricting competition or unduly obstructing trade (R. 1471, 1472, 1494); that where a com-

bination or conspiracy was entered into with the object of properly and fairly regulating the practice of medicine, that would not violate the Act; that if the jury found that the alleged conspiracy was a reasonable regulation of the practice of medicine and that its effect on trade is but indirect, that would not violate the Act (R. 1472, 1476); that if the jury found that petitioners did not intend to enter into a conspiracy or further any unlawful purpose, a conviction would not be warranted (R. 1480); that if GHA was engaged illegally in the practice of medicine, petitioners could enforce their rules and regulations forbidding members from aiding and abetting the illegal practice of medicine (R. 1474); that petitioners might oppose and criticize GHA and that, without more, would not violate the Act (R. 1484, 1485); that petitioners had the right to approve and disapprove all types of medical practice and make known their conclusions (R. 1477, 1478); that petitioners had the right of legitimate persuasion and reasoned argument to support what they believed was fair competition in the medical profession (R. 1477, 1492); that acts done by AMA prior to January 1, 1937, were only admissible as furnishing a background for a connection by AMA with the alleged conspiracy and cannot be used for the purpose of establishing the existence of the conspiracy (R. 1485, 1486); that the Milwaukee situation could only be considered as background to explain other testimony in the case (R. 1492); that if petitioners acted in self-interest, that is, protecting themselves from attack and opposition, that would not be a conspiracy to violate the Act (R. 1486); that DMS could adopt a constitutional provision forbidding members to have professional relationships with organizations engaged in the practice of medicine until such organizations had been approved by DMS and that membership in DMS is conditional upon compliance with the constitution (R. 1491); that Washington hospitals have the right to pass upon applicants for privileges

as the hospitals deem desirable, proper and necessary (R. 1491); that if the jury found that in the GHA arrangement the proper doctor and patient relationship was destroyed and the doctors rendered the hired servants of GHA, then GHA was practicing medicine illegally (R. 1475) and that petitioners, if appropriate facts were found, were under the Clayton and Norris-LaGuardia Acts and therefore, not guilty (R. 1493).

The Court of Appeals erroneously overruled petitioners' contentions that the charge to the jury was incorrect in the following particulars:

Gov. Instruction 13, given, charged in part (R. 1459, 1499) "* * * every person, who knowing of a conspiracy does any act or makes any statement intended to further the objects thereof, does thereby become a party to the unlawful conspiracy."

Gov. Instruction 14, given, (R. 1459, 1460, 1508) omitted one of the purposes of restraint charged in the indictment, i. e., restraining members of GHA, and the charge (R. 1508) stated that petitioners could be convicted if they were guilty of at least one of the purposes of restraint charged. (There was only one count; conspiracy is an agreement and must be proved as laid).

Gov. Instruction 22, given, (R. 1460, 1461, 1497, 1498) charged that if the jury found that petitioners were engaged in a conspiracy as charged, it was unnecessary for them to decide whether GHA violated the Principles of Medical Ethics, and it was immaterial that members of GHA may not have had freedom of choice of physicians or that GHA solicited Government employees to join it and that none of these matters should be considered by the jury in reaching their verdict.

Gov. Instructions 23 and 24, given, (R. 1464, 1467, 1468) charge that the quality of medical care rendered by GHA, its financial condition and its subsidies are irrelevant.

The charge stated (R. 1507) "one may also be liable for an overt act, though actually performed by another, if he knowingly instigates or supports the same by advising, encouraging, or abetting it"; and (R. 1507) "* * * acts and declarations of each party, shown to be a conspirator, in furtherance of the conspiracy, may be considered by the jury, in determining the guilt of others who are *accused*"; and (R. 1510) "as to corporate defendants they will be responsible if authorized officers acting for the corporation or in the name of the corporation, did acts within the apparent scope of the corporate powers, in forming *or* furthering the alleged conspiracy"; and (R. 1510) "* * * rules and regulatory actions cannot be justified where the real purpose *or* the natural results, are to interfere with free competition", and throughout the charge the court stated that the different methods and quality of medical care (R. 1498, 1512), the legality of GHA, its financial unsoundness, source of financial support or the fact that it was subsidized, petitioners' belief of illegality of GHA, and whether GHA violated medical ethics (R. 1497, 1498) were all irrelevant and immaterial. The denial of petitioners' instructions and the charge, as given, amounted to a directed verdict against petitioners.

CONCLUSION.

It is respectfully submitted that the petition should be granted and the judgments below reversed.

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July 3, 1942.

APPENDIX.

Sec. 2 of the Sherman Act of July 2, 1890, c. 647 (26 Stat. 209), 15 U. S. C. Sec. 3, reads in part:

"Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce * * * of the District of Columbia, or in restraint of trade or commerce between * * * the District of Columbia and any state or states or foreign nations, is declared illegal."

Sec. 1 of the Clayton Act of October 15, 1914, c. 323 (38 Stat. 730), 29 U. S. C. 53, reads:

"The word 'person' or 'persons' wherever used in section 52 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Sec. 6 of the Clayton Act of October 15, 1914, c. 323 (38 Stat. 731), 15 U. S. C. 17, reads in part:

"The labor of a human being is not a commodity or article of commerce."

Sec. 20 of the Clayton Act of October 15, 1914, c. 323 (38 Stat. 738), 29 U. S. C. 52, reads:

"No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

Sec. 4 of the Norris-LaGuardia Act of March 23, 1932, c. 90 (47 Stat. 70), 29 U. S. C. 104, reads:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any

strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interest in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified; regardless of any such undertaking or promise as is described in section 103 of this title."

Sec. 5 of the Norris-LaGuardia Act of March 23, 1932, c. 90 (47 Stat. 71), 29 U. S. C. 105, reads:

"No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title."

Sec. 6 of the Norris-LaGuardia Act of March 23, 1932, c. 90 (47 Stat. 71), 29 U. S. C. 106, reads:

"No officer or member of any association or organization, and no association or organization participating or

interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

Sec. 8 of the Norris-LaGuardia Act of March 23, 1932, c. 90 (47 Stat. 72), 29 U. S. C. 108, reads:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Sec. 13 of the Norris-LaGuardia Act of March 23, 1932, c. 90 (47 Stat. 73), 29 U. S. C. 113, reads:

"When used in sections 101-115 of this title, and for the purposes of such sections—(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or association of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons' participating or interested' therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the

same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.".

The Act of Feb. 27, 1929, c. 352 (45 Stat. 1326), known as the "Healing Arts Practice Act" (D. C. Code, 1940, Title 2, sections 2-101 to 2-130) is all inclusive and comprehends every kind and character of medical treatment.

Sec. 2-101 (a) defines "disease."

Sec. 2-101 (b) defines "The Healing Art" to mean:

"the art of detecting or attempting to detect the presence of any disease; of determining or attempting to determine the nature and state of any disease, if present; of preventing, relieving, correcting or curing, or of attempting to prevent, relieve, correct or cure any disease; of safeguarding or attempting to safeguard the life of any woman and infant through pregnancy and parturition; and of doing or attempting to do any of the acts enumerated above;"

Sec. 2-101 (c) provides:

" 'To practice' means to do or attempt to do, or to hold oneself out or to allow oneself to be held out as ready to do, any act enumerated in subsection (b) of this section as constituting a part of the healing art, for a fee, gift, or reward, or in anticipation of any fee, gift, or reward, whether tangible or intangible."

Sec. 2-102 forbids the practice of the healing art without a license.

Sec. 2-103 establishes a commission of licensure, prescribes for professional education, minimum educational or training requirements, the taking of examinations for fitness to practice by applicants, and the procedure for issuing licenses. The section renders it impossible for other than a natural person to practice the healing art legally.